U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11105898

Date: OCT. 14, 2020

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Worker (Extraordinary Ability)

The Petitioner, a dancer and choreographer, seeks classification as an alien of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner had not satisfied any of the ten initial evidentiary criteria for this classification, of which she must meet at least three. The Petitioner appealed the matter and we dismissed the appeal.[1] The Petitioner subsequently filed a combined motion to reopen and reconsider, which we dismissed as untimely, followed by a second combined motion, which we also dismissed.

On this third combined motion to reopen and reconsider, the Petitioner contends that our decision to dismiss her most recent motion was incorrect based on the controlling regulations.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *See* Section 291 of the Act, 8 U.S.C. § 1361. Upon review, we will dismiss the motion to reopen and the motion to reconsider.

I. MOTION REQUIREMENTS

To merit reopening or reconsideration, a petitioner must meet the formal filing requirements (such as, for instance, submission of a properly completed Form I-290B, Notice of Appeal or Motion, with the correct fee), and show proper cause for granting the motion. 8 C.F.R. § 103.5(a)(1).

A motion to reopen is based on factual grounds and must (1) state the new facts to be provided in the reopened proceeding; and (2) be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that we based our decision on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R.

[1] *See Matter of E-G-,* ID# 1668798 (AAO Oct. 25, 2018).

§ 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

The primary issue in this matter is whether the Petitioner has established that our decision to dismiss her second combined motion to reopen and reconsider was based on an incorrect application of law or USCIS policy.

A. Previous AAO Decisions

The record reflects that we issued our initial decision dismissing the Petitioner's appeal on October 25, 2018. The Petitioner filed her first combined motion on Thursday, November 29, 2018, 35 days after the decision was issued. A motion must be filed within 33 calendar days of the date USCIS served the unfavorable decision by mail. *See* 8 C.F.R. §§ 103.5(a)(1)(i), 103.8(b). When computing the period of time for filing an appeal or motion USCIS counts every calendar day (including Saturdays, Sundays, and legal holidays) starting the first calendar day after the date USCIS mailed the unfavorable decision. If the *last* day of the filing period falls on a Saturday, Sunday, or a legal holiday, the period to file an appeal runs until the end of the next day which is not a Saturday, Sunday, or legal holiday. *See* 8 C.F.R. § 1.2.

Here, we informed the Petitioner that any motion to reopen and/or reconsider our appellate decision must be filed within 33 days of our decision dated October 25, 2018. The due date for the Petitioner's motion was Tuesday, November 27, 2018, and this date did not fall on a weekend or legal holiday. Accordingly, we dismissed the Petitioner's motion, filed on November 29, 2018, as untimely.

In her second combined motion, the Petitioner alleged that our decision to dismiss her initial combined motion to reopen and reconsider as untimely was based on an incorrect application of law or policy. Specifically, she claimed:

> The 30th day of the filing fell on **Saturday, November 24, 2018** . . .. **The next day which was not on Saturday, Sunday or a legal holiday was Monday, November 26, 2018 . . . .** 8 C.F.R. § 103.8(b) provides for 3 days for to respond by mail. **This [motion] must have been received by Thursday, November 29, 2019.** AAO confirmed in the Notice of Denial that it was received on November 29, 2019. **ACCORDINGLY, THE MOTION TO REOPEN/RECONSIDER WAS SUBMITTED TIMELY WITHIN THE PERIOD PRESCRIBED BY THE REGULATIONS.**

(Emphasis in original).

We dismissed the second motion, emphasizing that the due date applicable to the Petitioner's motion was Tuesday, November 27, 2018. We noted that the Petitioner had not cited to any source of authority in support of her assertion that we should not count the Saturday and Sunday preceding the last day of the relevant filing period. Accordingly, we concluded that the Petitioner had not identified the nature of our alleged legal error.

B. Motion to Reconsider

In the brief submitted in support of the instant motion, the Petitioner states:

> In the dismissal, AAO cited to the controlling regulation, 8 C.F.R. § 1.2, which automatically established that its own dismissal decision was an error because the regulations mandated to roll the deadline to the next business day that was not a weekend or a holiday. The dismissal is therefore inconsistent with the code and is in error.

The Petitioner, however, does not specify how we misapplied this regulation or other law or USCIS policy in dismissing her second combined motion.

The Petitioner's assertion that her initial motion to reopen and reconsider was due 35 days after the date of our appellate decision, on Thursday, November 29, 2018 is based on a misinterpretation of the relevant regulations. Specifically, she previously argued that since the regulation at 8 C.F.R. § 103.5(a)(1) requires that motions be filed within 30 days, her motion was due on Saturday, November 24. She further suggested that, since this due date was on a Saturday, her actual filing deadline was Monday, November 26. Finally, she indicated that 8 C.F.R. § 103.8(b) allowed her three additional days to file her motion, until Thursday, November 29, 2018.

The regulation at 8 C.F.R. § 103.8(b) provides that whenever a person has the right or is required to do some act within a prescribed period after the service of a notice upon them and the notice is served by mail, 3 days shall be added to the prescribed period. Because we mailed the Petitioner's appellate decision, her prescribed period to submit a motion was automatically extended to 33 days. As a result, she was not required to file her motion within 30 days, and the last day of her prescribed filing period did not fall on Saturday, November 24, 2018.

As noted, this 33-day filing period was clearly communicated to her when our appellate decision was issued, and the 33rd day fell on Tuesday, November 27, 2018. As the last day of the filing period did not fall on a Saturday, Sunday or legal holiday, there was no basis to "roll the deadline" and the regulation at 8 C.F.R. § 1.2 was not applicable to our evaluation of whether the Petitioner's initial motion was timely. Accordingly, the Petitioner has not demonstrated that we incorrectly applied this or any other regulation or USCIS policy to the facts of her case or dismissed her previous combined motion in error.

In our previous decision, we also noted that the Petitioner had cited to 8 C.F.R. § 1001.1(h), which is applicable to appeals that fall under the jurisdiction of the Board of Immigration Appeals, rather than the nearly identical regulation at 8 C.F.R. § 1.2, which is applicable to appeals before our office. On motion, the Petitioner refers to a non-precedent decision, noting that "AAO has previously sustained matters relying on 8 C.F.R. § 1001.1(h)." The referenced decision was not published as a precedent and therefore does not bind USCIS officers in future adjudications. *See* 8 C.F.R. § 103.3(c). As discussed, the Petitioner in the matter did not have a prescribed filing period for her initial motion that ended on a Saturday, Sunday, or legal holiday, and neither the regulation at 8 C.F.R. § 1.2 or 8 C.F.R. § 1001.1(h) applies.

The Petitioner has not established that our decision to dismiss her second motion to reconsider was based on an incorrect application of law or USCIS policy. Accordingly, the motion to reconsider will be dismissed.

C. Motion to Reopen

Although the Petitioner indicates that she is concurrently filing a motion to reopen, she has not presented new facts or evidence for consideration in this proceeding and has not met the requirements of a motion to reopen at 8 C.F.R. § 103.5(a)(2). Accordingly, the motion to reopen will be dismissed.

III. CONCLUSION

For the reasons discussed, the Petitioner has not shown proper cause for reopening or reconsideration.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.